anyone, anywhere in the world, and confine him on an island forever, as long as it assures us that it is pursuing an "orderly windup,"[16] then we are long past little old ladies in Geneva who unwittingly give to the wrong charity.[17]

The Executive contends that, having seized individuals abroad and imprisoned them on a military base at a location of its choice, it may then invoke the nature and location of the prison as the reason the individuals may not be released, notwithstanding the illegality of the imprisonment. It cites *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the decision -- roundly criticized at the time and ever since -- that stranded Ignatz Mezei at Ellis Island, potentially indefinitely. It arose during a period not unlike our own, when a single word ("communist") prompted such fear and revulsion that few trifled to inquire whether, in a given case, the word fairly described the person branded with it. Justice Jackson -- who knew something of indefinite detention, having opened for the prosecution at Nuremberg by discussing what indefinite detention did to Germany[18] -- filed a dissent eerily predictive of our current national folly. "Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial," it began. *Id.* at 218. It continued: "Quite unconsciously, I am sure, the Government's theory of custody for 'safekeeping' without disclosure of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the 'protective custody' of the Nazis more than of any detaining

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[16] The Executive's position, vindicated by the court below, is that even that assurance must be accepted untested by the courts. *Cf.* Pet. 7.

[17] As this Court is aware, *see* Hamdan Tr. 21, the Executive argued in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C 2005), that it had the power to detain a "little old lady in Switzerland" who unwittingly gave to a charity front.

[18] 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL 110-11 (1947). The indictment alleged that the defendants used "protective custody" to make the regime "secure from attack and to instill fear in the hearts of the . . . people." *Id.* at 34-35.

procedure known to the common law." *Id.* at 226. Three others joined him.

Unlike Petitioners, Mezei left the U.S. voluntarily and returned, voluntarily, without a visa. The Executive did not buy him or interrogate him for six months in Kandahar before deciding to bring him in chains to "territory over which the United States exercise exclusive jurisdiction and control," *Rasul*, 542 U.S. at 475, a "place that belongs to the United States," *id.* at 487 (Kennedy, J., concurring in the judgment). And while the government apparently believed that Mezei was a "communist," the Executive concedes that Petitioners are not enemy combatants.

The Executive dismisses *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), on the ground that they construe an irrelevant immigration statute. Opp. 15-17. But the rule of each case is that *no* statute can be read to permit indefinite imprisonment -- even if it deals with alien criminals and appears on its face to authorize their indefinite imprisonment.

3. The district court was obliged to fashion a remedy.

Petitioners asked only that the district court do what Congress said it should do: command that the bodies be produced, conduct a hearing, and should it find (as it rightly did) no lawful basis for their imprisonment, order their discharge. 28 U.S.C. § 2243.

The Executive does not respond to the authorities cited in the petition that require a court having jurisdiction to decide a case and give an effectual remedy. *See also* ACLU Br. 14-20. Nor does immigration law justify the district court's abdication of that duty. *Id.* 5-14. No immigration status was sought here. Granting the relief sought by Petitioners would not conflict with statutory law, usurp the immigration authority of the political branches, or contravene the separation of powers doctrine. *Id.* To hold otherwise would make a mockery of the "Great Writ of Liberty." *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1 (N.Y. Univ. Press 20[illegible]). In fact, it would lead to the conclusion that *habeas* itself is an unconstitutional violation of separation of powers. Every time the writ is granted, a court orders the Executive to release someone that it, in the exercise of its prerogatives, had chosen to imprison.

Until now, that had been seen as the essence of separation of powers -- checks and balances operating precisely as they should. If the Executive is found to have detained someone illegally it is subject to an enforceable judicial order that the individual be released if the illegality cannot be promptly remedied. Here, as in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Executive asserts an entitlement to unilateral decisonmaking that "serves only to *condense* power into a single branch of government." 542 U.S. at 536. Here, as in *Hamdi*, the Court should vindicate the rule of law by rejecting that claim.

C. Certiorari Before Judgment Is Warranted.

Two years after *Rasul*, hundreds of Guantánamo cases languish at a standstill, *see Hamdan* March 28 Tr. 6, 54; Detainees' Br. 5, while the sufferings of men trapped in a lawless limbo intensify. *See* Detainees' Br. 16-19. The Court has granted certiorari before judgment in circumstances presenting similar combinations of extraordinary public importance, systemic fault lines, and clashes between the coordinate branches. *See* Pet. 14-19.[19] The issues are plain and can be resolved only by this Court. Delay pending an appellate decision will perpetuate not just the harm being suffered by these innocent Petitioners, *see* Uyghur Br. 7-9, but also the intolerable uncertainty that is stymying the lower courts and sapping the authority of the judiciary. Petitioners pray that, for the reasons set forth herein, in the petition, and in the briefs filed by supporting amici, the Court grant certiorari now.

Respectfully submitted,

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[19] The Executive's reliance, *see* Opp. 8 n.3, on the orders in *Padilla v. Hanft*, 125 S. Ct. 2906 (2005), and *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005), is misplaced. Those cases did not involve detainees who were concededly not enemy combatants and had been found by a court to be imprisoned unlawfully. Further, those petitioners had been granted relief below and the Executive argued that this Court should defer review pending further fact-finding. *See Padilla*, No. 04-1342, Brief in Opposition 7, 12, 15 (May 9, 2005); *Hamdan*, No. 04-702, Brief in Opposition 7, 9, 11 (Dec. 2004).

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IN THE

Supreme Court of the United States

ABU BAKKER QASSIM, ET AL.,

Petitioners,

—v.—

GEORGE W. BUSH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTRODUCTION[1]

The petitioners in this case are detained by the United States at its military base at Guantanamo Bay, Cuba. The government itself has concluded that the petitioners do *not* qualify as "enemy combatants" and a federal district court has correctly held that petitioners' continued detention under these circumstances is unlawful. The critically important question now presented to this Court is whether the federal courts are powerless to order a remedy for this unlawful detention, as the district court held, thus leaving the Executive with unreviewable discretion to determine if and when petitioners' unlawful custody will end.

Amicus recognizes that *certiorari* before judgment is rarely granted. We nonetheless believe it is appropriate in this case because the district court's conclusion is so fundamentally at odds with the history and purpose of habeas corpus, and because the ruling below dramatically highlights a pressing need to provide the lower courts with clear guidance on the proper scope of judicial authority in a habeas corpus proceeding.

As set forth below, the district court's failure to grant relief rests on three fundamental errors. *First*, the court erred in concluding that this Court's immigration cases and the political branches' authority over the admission of aliens preclude the Judiciary from fashioning a meaningful remedy for petitioners' unlawful custody. To the contrary, *Clark v. Martinez*, 543 U.S. 371 (2005), rejected the same separation of powers and security concerns that seemingly stymied the district court in this case, and this Court's rulings provide

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[1] Pursuant to Supreme Court Rule 37.2, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

ample authority to "parole" petitioners into the community subject to appropriate safeguards.

Second, the district court misapprehended the authority and flexibility provided by 28 U.S.C. § 2243. That statutory provision embodies a congressional directive that habeas courts exercise broad remedial authority to formulate appropriate relief when immediate release is not feasible.

Third, this is not the first instance in which an executive has tried to shape its detention practices in order to frustrate the ability of habeas courts to issue appropriate relief. As a matter of history and practice, therefore, habeas courts have long possessed the authority to fashion remedial orders that preserve the efficacy of the Great Writ and to ensure that unlawful custody does not continue unabated and indefinitely. Were the rule otherwise, habeas courts would be reduced to issuing advisory opinions and the Suspension Clause would be largely eviscerated.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the principles of liberty and equality guaranteed by the Constitution and the laws of the United States. In furtherance of these goals, the ACLU has participated in numerous cases before this Court involving the scope of habeas corpus and the rights of non-citizens, including *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003).

STATEMENT OF THE CASE

Petitioners Abu Bakker Qassim and Adel Abdu' Al-Hakim have commenced their fifth year of imprisonment by the United States. They were seized in late 2001 or early 2002, held in Afghanistan, and transported to Guantanamo

Naval Base by the United States government in June 2002, where they have been incarcerated ever since and remain today. Pet. App. 1a. They filed habeas corpus actions through counsel on March 10, 2005. Pet. App. 2a. In July 2005, petitioners' attorneys learned that both Qassim and Al-Hakim had been determined *not* to be "enemy combatants" by the "Combatant Status Review Tribunals" in March 2005. Pet. App. 2a-3a.

In December 2005, the district court held that any legal basis for petitioners' detention had ended and that their continued incarceration was unlawful. Pet. App. 6a. Yet, the district court declined to order their release or issue a remedial order of any kind. Instead, the court concluded that, despite its categorical finding that the detention of these prisoners "is unlawful," Pet. App. 6a, habeas relief would be denied because "a federal court has no relief to offer." Pet. App. 11a.[2]

In the district court, the government opposed any order of release and rejected any alternative to the petitioners' ongoing (and indefinite) incarceration. The district court considered and denied reassigning petitioners to non-custodial quarters at Guantanamo or ordering the government to consider exercising its statutory authority to transport petitioners within the district court's jurisdiction from Guantanamo to the District of Columbia. Pet. App. 7a-

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[2] Since the district court's decision in this case, Congress has amended the habeas corpus statute in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005). Amicus does not address that statute or its impact on this case at this stage because it was not in effect at the time of the district court's ruling and played no role in the district court's reasoning. As the petitioners note in their petition for writ of *certiorari* before judgment, there are ample grounds for the Detainee Treatment Act not applying to this case, which the parties may fully brief if the Court deems it necessary.

8a. The district court ruled that it lacked the power to provide a remedy that it unambiguously "believe[d] justice requires," Pet. App. 6a, including an order "requiring the petitioners' release, without specifying how, or to where," Pet. App. 8a.

On December 23, 2005, petitioners filed their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. That appeal is currently pending and scheduled for oral argument on May 8, 2006.

ARGUMENT

The central question at issue here is whether the district court erred in failing to grant *any* relief after finding that the petitioners' detention is unlawful. That question is of pervasive and enduring importance and should be answered by this Court immediately to give proper guidance to the courts of appeals and district courts grappling with habeas corpus actions challenging the detention of foreign nationals at Guantanamo Naval Base.

In the government's view and under the district court's ruling, the Judiciary would be powerless to grant any relief whatsoever even though the United States transported the petitioners involuntarily to Guantanamo, the petitioners have been determined by the government itself not to be subject to "enemy combatant" designation, and the court has ruled that their custody is without legal authority. If the district court's holding is allowed to stand, the Executive will have effectively thwarted the Judiciary's authority to remedy unlawful incarceration by detaining petitioners at Guantanamo Naval Base and then invoking the nature and location of Guantanamo as the reason they cannot be released. Such contrivances cannot be reconciled with the purpose or the protections of the Great Writ.

The district court's conclusion is based on a misreading of this Court's immigration cases, is contrary to

the Judiciary's remedial power under 28 U.S.C. § 2243, and violates the core purpose and historical guarantee of habeas corpus.

1. *This Court's Immigration Cases Do Not Bar the Judiciary From Ordering Release and Authorizing Parole of Unlawfully Detained Non-Citizens.*

The district court concluded that it could not grant any relief because of its mistaken conclusion that the political branches' authority over immigration admission and exclusion preclude a habeas court from ordering petitioners' transportation to the District of Columbia under the parole authority of the Executive. The court reasoned that "the only way [for the government] to comply with a release order would be to grant the petitioners entry into the United States" and that doing so would run afoul of the "special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens." Pet. App. 9a-10a. The district court further believed that "[a]n order requiring their release into the United States – even into some kind of parole 'bubble,' some legal-fictional status in which they would be here but would not have been 'admitted' – would have national security and diplomatic implications beyond the competence or the authority of this Court." Pet. App. 10a (footnote omitted).

As an initial matter, the district court's opinion makes plain but does not acknowledge the contradiction within its own analysis. The court correctly concluded that it necessarily had the power to order the petitioners brought to the United States to appear at a hearing before the court "[i]f genuine issues of material fact existed with regard to the legality of petitioners' detention." Pet. App. 7a. If that were the case, "the habeas statute and the authority of *Rasul v. Bush* would . . . support an order to produce the bodies of

petitioners here." Pet. App. 7a. Then, the district court could presumably "set appropriate conditions for petitioners' release into the community, on parole, until the government could arrange for their transfer to another country." Pet. App. 7a (citing authority).

But the district court rejected relying on that inherent authority because petitioners' claim is purely legal rather than factual, and their presence in court is not required to adjudicate their petition. Pet. App. 7a. Even assuming the court is correct in characterizing petitioners' claim as legal, the district court's power to order detainees brought to the District of Columbia cannot turn on that difference. Either a habeas court possesses (as it must) the authority both to conduct necessary hearings and – more critically – to grant meaningful relief if the petitioner prevails, or it does not. The power of the habeas court cannot be less *after* a finding of unlawful detention, and cannot depend on whether the petitioners' claim raises factual or legal issues. If the court's remedial capacity were to turn on that distinction, it would create the ironic (if not perverse) incentive for petitioners to assert a factual claim in order to trigger the court's greater authority and thereby to obtain meaningful relief.

More fundamentally, the district court erred in concluding that it lacked authority to order the Executive to "parole" petitioners to the United States as a remedy for the unlawful detention. That relief would not cause petitioners to be "admitted" to the United States in any sense that contravenes the political branches' immigration authority. The court's conclusion that such an order would compel the petitioners' "*entry* into the United States," Pet. App. 9a (emphasis added), reflects a fundamental misunderstanding of the parole authority and this Court's precedents. Far from being supported by the immigration case law of the Court, the district court's analysis is inconsistent with the reasoning

of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005).

The immigration statute provides a specific mechanism, "parole," by which noncitizens can be brought to the United States, or released from detention, without conferring any of the statutory rights that would accompany "admission" or a legal "entry." *See* 8 U.S.C. § 1182(d)(5)(A). The Court long ago recognized that allowing parole out of detention does not confer legal status on the alien:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"

Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (citations omitted). *See also Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute). A paroled alien has long been deemed to remain in the same status as one "on the threshold of initial entry." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Ordering the Executive to exercise its statutory parole authority to remedy its own unlawful conduct that is causing petitioners' detention would not run afoul of the separation of powers doctrine or usurp the role of the political